

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

The Scoular Company
Appellant,

v.

Chase County Board of Equalization
Appellee

Case No: 10C-016

Decision Reversing the
Determination of the
Chase County
Board of Equalization

For the Appellant:

Sheila Lenagh,
Director, The Scoular Company

For the Appellee:

Arlan Wine
Chase County Attorney

Heard before Commissioners Hotz and Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a commercial parcel located in Chase County, Nebraska. The parcel consists of 8.15 acres, improved with a variety of buildings and equipment relating to the commercial storage of grain. E2:29-30. The legal description of the parcel is found at Exhibit 1. The property record card for the subject property is found at Exhibit 2:28-30.

II. PROCEDURAL HISTORY

The Chase County Assessor determined that the assessed value of the subject property was \$3,159,168 for tax year 2010, including \$10,413 for the land and \$3,148,755 for the improvements. The Scoular Company (Taxpayer) protested this assessment to the Chase County Board of Equalization (BOE) and requested an assessed valuation of \$1,861,992. The Taxpayer did not dispute the value of the land at \$10,413, but asserted the market value of the improvements was \$1,851,579 rather than \$3,148,755. The BOE determined that the assessed value for tax year 2010 was \$3,159,168, including \$10,413 for the land and \$3,148,755 for the improvements. (E1).

The Taxpayer appealed the decision of the BOE to the Tax Equalization and Review Commission (Commission). Prior to the hearing, the parties exchanged thirty-four exhibits and

submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on July 12, 2011.

III. STANDARD OF REVIEW

When the Commission considers an appeal of a decision of a county board of equalization, a presumption exists that the “board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”

Brenner v. Banner Cty. Bd. Of Equal., 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008)

(Citations omitted).

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.

Id. The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (2010 Cum. Supp.). Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value) . The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may

consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.” Neb. Rev. Stat. §77-5016(8) (2011 Supp.). The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it. Neb. Rev. Stat. §77-5016(6) (2011 Supp.).

IV. VALUATION

A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.

Neb. Rev. Stat. §77-112 (Reissue 2009). “Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”

Neb. Rev. Stat. §77-112 (Reissue 2009). “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002). Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009). All real property in [Nebraska] subject to taxation shall be assessed as of January 1. See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009) All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).

“The term tangible personal property [includes] trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property...” Neb. Rev.

Stat. § 77-105 (Reissue 2009). Section 77-105 “clearly controls the issue of classification of fixtures for taxation purposes.” *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 584, 281 Neb. 437, 442 (2011).

B. Summary of the Evidence

1. Improvements

Mark Mossman testified on behalf of the Taxpayer. Mossman was the Senior Group Manager for the Northern Facility Group of The Scoular Company. He testified at length about the improvement the County Assessor identified as the “Flathouse,” which was used for the storage of grain. He described the improvement as a “glorified bunker,” with 20 feet tall concrete walls, an aeration system, and a coverall tarp over bare ground, designed to store grain sixteen feet high.

Mossman described how two similar facilities owned by the Taxpayer in Nebraska and Kansas had experienced damage to the coveralls, a rubber membrane covering the top of the flathouse, during windstorms. He testified the coverall had been under a warranty by the manufacturer until the manufacturer had experienced bankruptcy. E24-27. Mossman testified that the industry was moving away from the use of these coveralls due to damages sustained in windstorms. He described the coveralls as having become functionally obsolete. Mossman did not quantify this functional obsolescence, nor was any evidence received in the appeal which quantified the functional depreciation of this particular improvement.

Sheila Lenagh also testified on behalf of the Taxpayer. Lenagh was the Director of State & Local Tax for the Taxpayer. She explained that the subject property was operated as part of the Taxpayer’s grain merchandizing company to store and sell grain. Lenagh testified that in addition to the subject property, the Taxpayer operated five other similar facilities in neighboring Nebraska counties, all of which installed coveralls in 2008 or 2009. None of the properties had been sold.

Two appraisal reports were offered by the Taxpayer but were not received in evidence. E12, E13. The BOE’s hearsay objection was sustained per Neb. Rev. Stat. Section 77-5016(5). See, *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008) (concluding that the Commission’s decision to sustain a hearsay objection was appropriate because Neb. Rev. Stat. Section 77-5016(5) grants parties the right to cross examination).

Darrel Stanard testified on behalf of the BOE. Stanard had been hired by the County Assessor to set a value for the subject property. He testified there were no comparable sales and not enough income history for the subject property to estimate a value using the sales comparison approach or the income approach, so he used the Cost Approach. Stanard testified that his opinion of value for the subject property was \$3,159,168.

Stanard testified he inspected the subject property once in each of the years 2008, 2009, 2010, and 2011. At these site visits, he gathered information and took measurements and photographs. He provided this information to the County Assessor, who input the data into TerraScan, a computer-assisted mass appraisal system. When developing his estimate of value using the cost approach, Stanard testified that costing and depreciation factors from a 2007 version of the Marshall Valuation Service were used.

Regarding his use of the Cost Approach as applied to the Flathouse, Stanard testified that the internal portion of the Flathouse was similar to a more common twenty foot flat storage “bunker silo.” Since Marshall Valuation Service had no specific costing tables for the unique features of the structure, he testified that the replacement cost new was based upon the costing factors for a flat storage building like a bunker silo. He indicated that the twenty foot high concrete walls would have a life expectancy of 40 to 50 years, but that the coverall would have a shorter expected life. Stanard testified that he determined the overall structure had a life expectancy of 15 years. His opinion was that the appropriate physical depreciation factor was 15% for tax year 2010, based upon an effective age of two to three years. Stanard’s calculations were the basis for the property record card for the subject property. E2:28-30. Per those calculations, the replacement cost new less depreciation of the Flathouse was \$2,245,360. E2:29.

The Commission has the authority to consider and utilize the Marshall Valuation Service costing manual under Neb. Rev. Stat. Section 77-5016(3) and has reviewed its application to the property record card relied upon by the BOE. E2:28-30. Stanard testified that the costing factors used to estimate the January 1, 2010 value of the subject property were based upon a 2007 version of the Marshall Valuation Service. In its review of the cost approach relied upon by the BOE, the Commission has reviewed and considered the relevant and time-applicable provisions of the Marshall Valuation Service costing manual which have been updated since 2007.

According to Stanard’s testimony, it was his opinion that the depreciation to be deducted from the replacement cost new of the Flathouse was 15% for physical depreciation. However, the

property record card indicated 15% functional depreciation, and no physical depreciation.¹ Stanard testified that, “[i]t appears the physical got placed in the functional column.” Since 15% would be deducted in the same manner in the cost approach whether it is in the form of physical depreciation or functional depreciation, this distinction would result in no difference in value.

There was not clear and convincing evidence that the cost approach relied upon by the BOE was unreasonable as it listed the characteristics of this particular improvement as a 104,000 square foot Average Class S Flathouse storage building, of average quality materials, and with a 15 year life expectancy and 15% depreciation. However, the Commission finds that the cost approach calculations were unreasonable because an incorrect wall height was used for the Flathouse. There is clear and convincing evidence, based upon the testimony of Mossman and Stanard, that the Flathouse walls were 20 feet in height, not 40 feet as indicated on the property record card. E2:29. This discrepancy is significant, and results in a much lower replacement cost new for the Flathouse when applying the appropriate Marshall Valuation Service height factor for 20 foot walls. Per the 2007 Marshall Valuation Service costing manual used in the Cost Approach relied upon by the BOE, a height factor of 1.5 was used for the Flathouse with a height of 40 feet. Using the May, 2009 costing manual for a Flathouse with a height of 20 feet, the correct factor would instead be 1.192. *Residential Cost Handbook*, Marshall & Swift/Boeckh, LLC, (5/2009), Section 17, page 60. To correct the error, the replacement cost new determined by the BOE of \$2,641,600 is divided by 1.5 (to remove the influence of the incorrect height factor), equaling \$1,761,067, which then is multiplied by 1.192 (the correct height factor), resulting in a new replacement cost new for the Flathouse of \$2,099,191. With the depreciation deduction of 15%, the replacement cost new less depreciation for the Flathouse equals \$1,784,313.

Therefore, when applying the appropriate Marshall Valuation Service costing factors, and after correcting the height measurement to 20 feet, the Commission finds that the Flathouse had a cost approach replacement cost new less depreciation value of \$1,784,313 rather than \$2,245,360 for tax year 2010.

¹ “Functional or technical obsolescence is loss in value due to lack of utility or desirability of part or all of the property, inherent to the improvement or equipment. Thus a new structure or piece of equipment may suffer obsolescence when built.” *Residential Cost Handbook*, Marshall & Swift/Boeckh, LLC, (12/2010) at E-1. “Physical depreciation is loss in value due to physical deterioration.” *Residential Cost Handbook*, Marshall & Swift/Boeckh, LLC, (12/2010) at E-1.

2. Trade Fixtures

The Cost Approach relied upon by the BOE also included the costing of nine items relating to what are known as grain legs. E2:29-30. A photograph of some component of these nine items is shown at E2:28. “The term tangible personal property [includes] trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property...” Neb. Rev. Stat. § 77-105 (Reissue 2009).² The Commission finds that grain legs, and their associated components are trade fixtures, not real property, and should not have been included with the real property that was valued using the Cost Approach.³

The Commission finds that there is clear and convincing evidence that the Cost Approach calculation relied upon by the BOE was unreasonable. As discussed above, the Commission has corrected the replacement cost new less depreciation of the Flathouse and has removed the nine grain leg components since they should not have been included as real property. With those corrections, the Commission finds the Cost Approach value of the subject property to be \$2,563,834 as shown below:

Total Replacement Cost New Less Depreciation determined by BOE per E2:29-30	\$3,161,868 ⁴
Exclude nine items relating to Grain Legs	- \$147,400
Subtract value of Flathouse at height of 40 feet	- \$2,245,360
Add value of Flathouse with height of 20 feet	+ \$1,784,313
Land	+ <u>\$10,413</u>
Corrected Replacement Cost New Less Depreciation	\$2,563,834

The Commission therefore finds that the actual value of the subject property is \$2,563,834.

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its

² Section 77-105 “clearly controls the issue of classification of fixtures for taxation purposes.” *Vandenberg v. Butler County Board of Equalization*, 796 N.W.2d 580, 584, 281 Neb. 437, 442 (2011).

³ This includes five items listed as “GRAIN LEG,” two items listed as “FV/170’ LF-6500 BPH,” one item listed as “FV/230’ LF-10000 BPH,” and one item listed as “FVALUE-GRAIN LEG.” E2:29-30.

⁴ The total of the replacement cost new less depreciation of all items listed on E2:29-30 equals \$3,161,868, not \$3,159,168 as shown on E2:30.

determination. The Commission also finds that there is clear and convincing evidence that the County Board's determination was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board is Vacated and Reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The Decision of the Chase County Board of Equalization determining the value of the subject property for tax year 2010 is Vacated and Reversed.⁵
2. That the Assessed value of the Subject property for tax year 2010 is:

Land	\$10,413
Improvements	<u>\$2,553,421</u>
Total	\$2,563,834

3. This decision and order, if no appeal is timely filed, shall be certified to the Chase County Treasurer and the Chase County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2010 Cum. Supp.)
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each Party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2010.

⁵ Assessed value, as determined by the county board of equalization, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the county board of equalization at the protest proceeding.

7. This order is effective for purposes of appeal on December 23, 2011.

Signed and Sealed: December 23, 2011

SEAL

Robert W. Hotz, Commissioner

Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2010 Cum. Supp.), other provisions of Nebraska Statute and Court Rules.